

STATE OF MICHIGAN
COURT OF APPEALS

COBURN NEASON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

January 28, 2003

No. 233882

Washtenaw Circuit Court

LC No. 00-000545-NZ

Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s grant of defendant’s motion for summary disposition on the basis of MCR 2.116(C)(10). Plaintiff failed to show the existence of a genuine issue of material fact with regard to his claim that defendant discriminated against him on the basis of his race in violation of Michigan’s Civil Rights Act, MCL 37.2101 *et seq.* We affirm.

Plaintiff first argues that reversal is required because the trial court assessed the credibility of the evidence it reviewed and impermissibly engaged in fact-finding. We disagree. This Court reviews de novo a trial court’s grant of summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests a claim’s factual support. *Id.* at 338. The burden of showing the existence of a genuine issue of material fact rests on the party opposing the motion. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Review of the trial court’s ruling on defendant’s motion for summary disposition under MCR 2.116(C)(10) requires this Court to review all the documentary evidence submitted by the parties and to resolve all reasonable doubts in favor of the nonmoving party. *Skinner, supra* at 161-162.

Plaintiff correctly asserts that a trial court may not weigh the credibility of witnesses when deciding a motion for summary disposition. *Blasé v Appicelli*, 195 Mich App 174, 179; 489 NW2d 129 (1992). Moreover, in ruling on a motion for summary disposition under MCR 2.116(C)(10), a trial court may not make factual findings. *Jackhill Oil Co v Powell Production, Inc.*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

Here, the trial court detailed its reasoning for concluding that no genuine issue of material fact existed with regard to plaintiff’s claim that defendant treated him differently from other similarly situated employees who had engaged in similar misconduct. The court noted, solely on

the basis of the documentary evidence it was obligated to review, that none of the employees on whom plaintiff relied was similarly situated to him for purposes of establishing a prima facie case of discrimination. The court did not weigh the credibility of witness testimony in making this determination. A review of the court's opinion reveals the court's careful attention to the documentation and its proper role in plaintiff's prima facie case and defendant's motion for summary disposition. The trial court properly declined to consider plaintiff's unsupported allegations and other inadmissible evidence plaintiff offered. MCR 2.116(G)(3); *Karbel v Comerica Bank*, 247 Mich App 90, 104; 635 NW2d 69 (2001). Although this Court is to be liberal in finding genuine issues of material fact, the trial court correctly concluded that plaintiff failed to make the requisite showing in the instant case. *Marlo Beauty Supply Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998).

Plaintiff next contends that even if the trial court did not improperly make factual findings in ruling on defendant's motion the court wrongly concluded that a genuine issue of material fact did not exist with regard to whether plaintiff was similarly situated with the employees plaintiff named. We disagree.

A prima facie case of discrimination based on disparate treatment requires plaintiff to show: (1) he belonged to a protected class; (2) he was subject to an adverse employment action; (3) he was qualified for his job position; and (4) other similarly situated employees not in plaintiff's class were not subject to the adverse action. *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000). When a plaintiff cannot produce direct evidence of racial bias, he may present indirect evidence using the familiar steps in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001).

Plaintiff's primary dispute is with defendant's – not the trial court's – characterization of plaintiff as an employee who used a weapon in a fight at work. Defendant's investigation revealed that plaintiff used a weapon and it was on that basis that defendant terminated plaintiff's employment. Clearly, if plaintiff had not been "armed," discharge was a consequence far more severe than the consequences given other employees for the same or similar conduct. Our Supreme Court sustained an employment security commission referee's findings of fact under the statutory standard outlined in MCL 423.216(d) (findings supported by competent, material, and substantive evidence on the record considered as a whole). *Parks v Unemployment Security Comm*, 427 Mich 224, 238, n 4; 398 NW2d 275 (1986). On our review of the record, we are confident that the trial court's conclusion regarding the factual findings on which the parties relied below is similarly supported.

Even if plaintiff had succeeded in presenting a prima facie case of discrimination based on disparate treatment, a defendant may rebut the presumption of discrimination with a legitimate and nondiscriminatory explanation of its employment decision. *Hazle, supra* at 464; *Sisson v Bd of Regents of the University of Michigan*, 174 Mich App 742, 748; 436 NW2d 747 (1989). Here, defendant demonstrated that discharging its employees who use weapons to fight at work was an appropriate and facially neutral consequence of that behavior. Having proffered a satisfactory explanation for the adverse employment action, the burden shifted back to plaintiff to show that defendant's reason was pretextual, that a genuine issue of material fact exists with regard to defendant's real motive for the action. *Sisson, supra* at 748. Even viewed in the light

most favorable to plaintiff, we agree with the trial court that the evidence presented could not have supported plaintiff's claim of pretext. *Sisson, supra* at 748-749.

Plaintiff's next argument is that the trial court erred in ruling that plaintiff failed to present statistical evidence sufficient to support his disparate impact claim. We disagree.

Plaintiff's claim of disparate impact required him to establish that defendant engages in a facially neutral employment practice that, in actual practice, results in harsher treatment of a protected group for reasons not justified by legitimate business considerations. *Tamera Smith, supra* at 450-451. Plaintiff argues that he presented sufficient evidence that defendant's use of the historical "umpire decisions" in employee disciplinary actions had a disparate impact on members of his protected class.

In addition to plaintiff's single paragraph in support of this argument, the only umpire decision submitted as evidence in this case was Umpire Decision No. C-107, issued on September 23, 1943. Decision No. C-107 involved a situation not even remotely similar to the instant circumstances and does not identify any of the actors by his or her race. Umpire Decision No. C-107 provides no support for plaintiff's claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey